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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 638

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Judicial Code:

Section 57 (Act of Cong. Mar. 8, 1875, c. 137, Sec. 8, 18 Stat. 472, 28 U. S. C. A. Sec. 118) 2, 4, 7

AUTHORITY CITED

Remington on Bankruptcy (4th Ed.), Vol. 5:

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Section 2336, page 486 9

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I

Statement.

On May 29, 1936, one William Fox was adjudicated a bankrupt in the United States District Court for the District of New Jersey (R. 3). The petitioner herein was appointed Trustee in Bankruptcy and duly qualified as such (R. 3). Prior to the adjudication in the said bankruptcy, and on or about January 30, 1936, respondent, All Continent Corporation, a Delaware corporation, opened a stock brokerage account with J. W. Sparks & Company, in Philadelphia, Pennsylvania (R. 26). The assets contained in this account were at all times owned by respondent (R. 30). The bankrupt never had any interest in

this account or in the shares of stock which were in this account (R. 30). Furthermore, the bankrupt has no interest in the capital stock of the respondent and has had no interest since January 28, 1931 (R. 79), at which time he created a trust, by deed of trust dated that day, for the members of his family, the corpus of which consisted of all the capital stock of the respondent (R. 79-87).

Prior to the said adjudication in bankruptcy and on March 27, 1936, the Capital Company, a judgment-creditor of William Fox, served a third party subpoena in proceedings supplementary to judgment, as a judgment-creditor of William Fox, upon J. W. Sparks & Company, enjoining and restraining the said brokers from transferring any property of William Fox, judgment-debtor (R. 27), held in the name of William Fox or in the name of many other persons including respondent (R. 35). Thereafter, respondent, in the regular course of its business, ordered J. W. Sparks & Company to deliver the securities to it (R. 30). J. W. Sparks & Company refused to comply with this order (R. 30), contending that the claims made by the Capital Company and by the petitioner placed the said brokers in jeopardy if it should be determined ultimately that the stock was the property of the bankrupt and not of respondent (R. 30, 132). Thereafter, on September 8, 1936, the respondent instituted a suit in the United States District Court for the Eastern District of Pennsylvania (hereinafter called the "Pennsylvania suit"), pursuant to Section 57 of the Judicial Code (Act of Cong. Mar. 8, 1875, c. 137, Sec. 8, 18 Stat. 472, 28 U. S. C. A. Sec. 118), to remove a cloud upon the title to the shares of stock, then in the possession of J. W. Sparks & Company, within said district (R. 23-36). Respondent joined the Capital Company as a party defendant because it was the third party subpoena obtained and served by the Capital Company which created the cloud upon the title of the securities (R. 27). The respondent also joined the petitioner because the petitioner joined with counsel for the Capital Company in opposing an application made to

the bankruptcy court which was designed to put an end to the proceedings by which the Capital Company originally had created the cloud (R. 29, 30). The answer of J. W. Sparks & Company in the Pennsylvania suit admits that the petitioner's acts have continued and perpetuated the aforesaid cloud upon the title to the securities, and in view of their debit balance amounting to over $300,000 J. W. Sparks & Company joined with the respondent in praying that the interests of all the parties in the Pennsylvania suit be determined and adjudicated expeditiously (R. 132, 134, 135).

On that day, September 8, 1936, the United States District Court for the Eastern District of Pennsylvania ordered that a subpoena issue and that the petitioner answer, plead or demur to the bill of complaint within twenty days (R. 37, 38). On September 9, 1936, the aforesaid subpoena was served upon petitioner (R. 18). On September 18, 1936, petitioner was served with a copy of the order to plead entered in the Pennsylvania suit (R. 18). On September 22, 1936, petitioner petitioned the bankruptcy court (R. 3-38) to enjoin the respondent from further prosecuting the Pennsylvania suit as against all the defendants therein, on the ground that the respondent in the Pennsylvania suit is endeavoring

> "to force the trial of the issue of the ownership of property standing in its name concerning the real, true and bona fide ownership of which examination and investigation is now being made in orderly procedure under said Section 21-a of said Bankruptcy Act, by virtue of permission and leave granted by said order entered in this cause as aforesaid. To permit said All Continent Corporation to proceed with said litigation before said investigation and examination under Section 21-a of said Bankruptcy Act is concluded would require petitioner herein to enter upon the trial of the question of the ownership of the property and assets mentioned in said bill of complaint, a copy of which is attached hereto, without such knowledge and information as might be gleaned from the orderly continuance of

said 21-a examination and a complete examination and audit of the books of All Continent Corporation" (R. 9, 10).

On October 7, 1936, the bankruptcy court entered an order holding that petitioner was improperly made a defendant in said Pennsylvania suit, and "that the prosecution of said suit against said Trustee would interfere materially with the proper and orderly administration of the affairs of this bankrupt estate" (R. 45), and enjoined and restrained respondent from further prosecuting said Pennsylvania suit against the petitioner (R. 44, 45).

By order dated October 13, 1936, the Referee in Bankruptcy, upon petition of petitioner, authorized the commencement of a plenary suit in the Chancery Court of New Jersey (R. 53), to try the same issue which the petitioner had urged could not be tried without the completion of the 21-a examination. In this Chancery suit neither the Capital Company nor J. W. Sparks & Company are parties defendant (R. 75).

On appeal duly taken, the Circuit Court of Appeals for the Third Circuit unanimously reversed the order of the District Court holding that the District Court was without power to enjoin the Pennsylvania suit (R. 147), and that in any event the Pennsylvania suit did not interfere with the administration of the bankrupt estate (R. 145).

II

Question Presented.

The petition presents the question whether a court of bankruptcy has the power to, or should, enjoin the prosecution of a suit in equity, instituted pursuant to Section 57 of the Judicial Code (Act of Cong., Mar. 8, 1875, c. 137, Sec. 8, 18 Stat. 472; 28 U. S. C. A., Sec. 118) as against a trustee in bankruptcy and others, in a United

States District Court in which district the property involved is physically located and which property is not in the actual or constructive possession of the trustee or the bankruptcy court and when no affirmative relief is requested against the trustee.

III

ARGUMENT

POINT I

THE PENNSYLVANIA SUIT DOES NOT IN ANY WAY IMPAIR OR DEFEAT THE JURISDICTION OF THE BANKRUPTCY COURT.

1. The suit does not seek to reach or interfere with assets in the bankruptcy court.

The assets in question are not in the *actual* possession of the bankruptcy court. They are the assets of the respondent in the hands of its brokers, physically located in the Eastern District of Pennsylvania (R. 130). The account was created by respondent pursuant to duly authorized agreements executed by respondent (R. 135-139) and the assets in said account were accepted by the brokers as the property of the respondent (R. 130, 131).

Nor are the assets in the *constructive* possession of the bankruptcy court (*Taubel, etc., Co.* v. *Fox*, 264 U. S. 426, 432, 433, 438). The respondent has at all times asserted its claim to these assets which is adverse to any claim of the bankrupt or the petitioner. The petitioner, to reach these assets, must do so by a plenary suit (*Harrison* v. *Chamberlin*, 271 U. S. 191). This must be deemed admitted by the petitioner in view of the commencement of such a suit in the Chancery Court immediately after the issuance of the injunction by the bankruptcy court.

2. The Pennsylvania suit does not otherwise hinder or embarrass the petitioner in the orderly performance of his duties.

The sole claim of petitioner when before the bankruptcy court was that the Pennsylvania suit somehow embarrasses petitioner in the proper performance of his duties. It will be noted that the Pennsylvania suit seeks no affirmative relief against petitioner, nor any decree as to property actually or constructively in his hands.

The petitioner's petition to the bankruptcy court averred that petitioner would be unable to proceed with a plenary suit until the conclusion of the 21-a examination then pending. Within a few days after the bankruptcy court enjoined prosecution of the Pennsylvania suit, petitioner filed his bill of complaint in the Chancery Court of New Jersey, although the 21-a proceedings had not yet been concluded.

Petitioner, in said petition, also averred that the respondent was attempting to try the same issue as would necessarily be tried after he obtained the necessary information in the 21-a examinations (R. 9, 10). His bill of complaint in the Chancery Court sets forth the identical issue, to-wit, whether or not the assets of the respondent are the assets of the bankrupt estate, or whether they are the assets of the respondent free from all claims of the petitioner. The Circuit Court of Appeals, in its opinion, reached this conclusion (R. 146). Likewise, the Vice-Chancellor in the Chancery Court of New Jersey, on the petition for removal to the Federal Court, reached the same conclusion as to the nature of the issue in the Chancery bill of complaint (see respondent's answer in opposition to the petition for a temporary restraining order and temporary injunction, pp. 24-36).

POINT II

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DID ACQUIRE EXCLUSIVE JURISDICTION OVER THE CONTROVERSY BEFORE IT.

Certificates of stock are property within the meaning of Section 57 of the Judicial Code, and constitute the *res* in the jurisdiction where the certificates are located (*Franz* v. *Franz*, 15 F. [2d] 797, certiorari denied 273 U. S. 756). Where suits are instituted seeking similar or different relief, involving similar or different issues, but affecting the same *res*, the jurisdiction of the court in which the action was first brought is paramount to that of any other court (*Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 197; *Farmers Loan and Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51, 61).

The bankruptcy court does not have exclusive jurisdiction over assets which petitioner claims belong to the bankrupt estate, as such assets are in the actual possession of an adverse claimant and not in the actual or constructive possession of the petitioner or the bankruptcy court (*Kerr* v. *Southwestern Lumber Co. of New Jersey* [C. C. A. 5], 78 F. [2d] 348, certiorari denied, 296 U. S. 611; for a more complete analysis see opinion in this case by the District Court, 11 F. Supp. 253, 256-259). Nor did the bankruptcy court ever acquire jurisdiction over the issue of the ownership of the assets of the respondent. Were this not so, the suit in the Chancery Court of New Jersey would never have been commenced by the petitioner. This latter suit is his admission that that issue was not before the bankruptcy court.

Furthermore, as petitioner was required to bring a plenary suit under Section 70 (e) of the Bankruptcy Act (Act of Cong. July 1, 1898, c. 541, Sec. 70 [e], 30 Stat. 566, as amended Act of Cong. Feb. 5, 1903, c. 487, Sec. 16, 32 Stat. 800, 11 U. S. C. A. Sec. 110 [e]) to test the

claimed right or title to the property, resort must be had to the court having jurisdiction and possession of the *res*. This the Pennsylvania District Court had since September 8, 1936. Therefore, the bankruptcy court was without jurisdiction, exclusive or concurrent, as to the assets involved in the Pennsylvania suit (*Boyle* v. *Gray*, 28 F. [2d] 7, 16, certiorari denied 278 U. S. 653) and had no power to enjoin the prosecution of the Pennsylvania suit.

In addition, J. W. Sparks & Company's debit balance on the securities involved in the Pennsylvania suit is endangered because of the nature of the assets securing said debit balance. Therefore the defendants J. W. Sparks & Company in their answer also prayed for a determination of the interests of the Capital Company, the petitioner, and the respondent.

The petitioner states (at p. 22 of the brief in support of petition) that only in case the Capital Company is successful in the Pennsylvania suit will the petitioner become involved in a controversy with the Capital Company over the enforcement of an alleged lien of the Capital Company against the *res* which is subject to the control of the Pennsylvania District Court. This, no doubt, would be a circuitous method of reaching a result which can readily be attained in the Pennsylvania District Court. As the Capital Company's claim is independent of and adverse to any claim of petitioner and both the petitioner's and Capital Company's claims are adverse to the respondent, and all the aforementioned parties and the *res* are before the Pennsylvania District Court, it is in that court only that a full determination of the title to these assets can be achieved.

POINT III

THE PETITIONER IS A PROPER PARTY DEFENDANT IN THE PENNSYLVANIA SUIT.

As the *res* is not within the control of the bankruptcy court, and another court has jurisdiction over it, the respondent properly joined the petitioner as a party defendant to cut off his rights (*Remington on Bankruptcy* [4th Ed.], Vol. 5, Sec. 2331, p. 477), and leave of the bankruptcy court is not requisite before joining the petitioner as a party defendant where affirmative relief is not asked for against him (*Remington on Bankruptcy* [4th Ed.], Vol. 5, Sec. 2336, p. 486; *In re Smith* [S. D. N. Y.], 121 Fed. 1014; *Duncan* v. *Fox* [S. D. Fla.], 300 Fed. 165; *Massachusetts Mutual Life Insurance Co.* v. *Grossman* [S. D. N. Y.], 4 F. Supp. 990). These cases determine that where the property in question is not in the possession of the bankruptcy court and the suit cannot mature into any charge on the assets of the bankrupt estate, being only an invitation to come in and get more assets if the trustee be entitled thereto, leave of the bankruptcy court to make the trustee a party defendant is unnecessary. Since leave is not necessary, the bankruptcy court is without power to restrain the joinder of the petitioner as a party defendant. The Pennsylvania suit is clearly not an attempt to deprive the bankrupt estate of assets. It merely extends to the petitioner an invitation to establish his right to assets.

POINT IV

DICTA CANNOT BE PREJUDICIAL.

Expressions found in the opinion of the Circuit Court of Appeals, which are claimed by petitioner to be beyond the points involved, do not come within the rule of *stare decisis* (*Humphrey's Executor* v. *United States*, 295 U. S. 602, 626) and are not permitted to control the judgment in subsequent suits (*Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291). Therefore, the dicta, if any be found, cannot be prejudicial to the petitioner.

Respectfully submitted,

BENJAMIN REASS,
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